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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 RICHARD WHITE,

11 Plaintiff,

No. CIV S-04-0559 KJM

12 vs.

13 JO ANNE B. BARNHART,  
14 Commissioner of Social Security,

15 Defendant.

ORDER

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17 Plaintiff seeks judicial review of a final decision of the Commissioner of Social  
18 Security (“Commissioner”) denying applications for Disability Income Benefits (“DIB”) and  
19 Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act  
20 (“Act”), respectively. For the reasons discussed below, the court will deny plaintiff’s motion for  
21 summary judgment or remand and grant the Commissioner’s cross-motion for summary  
22 judgment.

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I. Factual and Procedural Background

In a decision dated November 27, 2002, the ALJ determined plaintiff was not disabled.<sup>1</sup> The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review. The ALJ found plaintiff has a severe impairment due to a history of hepatitis C but this impairment is not medically equal to a listed impairment; plaintiff is not credible; plaintiff retains the residual functional capacity to perform a full range of light work; plaintiff cannot perform his past relevant work; based on the testimony of a vocational expert, plaintiff can make a successful vocational adjustment to work that exists in significant numbers in the national economy; and plaintiff is not disabled. Administrative

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<sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the Social Security program, 42 U.S.C. § 401 *et seq.* Supplemental Security Income ("SSP") is paid to disabled persons with low income. 42 U.S.C. § 1382 *et seq.* Under both provisions, disability is defined, in part, as an "inability to engage in any substantial gainful activity" due to "a medically determinable physical or mental impairment." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. *See* 20 C.F.R. §§ 423(d)(1)(a), 416.920 & 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). The following summarizes the sequential evaluation:

Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.

Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App.1? If so, the claimant is automatically determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled. \_\_\_\_\_

*Lester v. Chater*, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. *Bowen*, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. *Id.*

1 Transcript (“AT”) 19-20. Plaintiff contends the ALJ did not properly account for plaintiff’s  
2 fatigue in determining plaintiff’s residual functional capacity.

3 II. Standard of Review

4 The court reviews the Commissioner’s decision to determine whether (1) it is  
5 based on proper legal standards under 42 U.S.C. § 405(g), and (2) substantial evidence in the  
6 record as a whole supports it. Copeland v. Bowen, 861 F.2d 536, 538 (9th Cir. 1988) (citing  
7 Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573, 575-76 (9th Cir. 1988)).  
8 Substantial evidence means more than a mere scintilla of evidence, but less than a  
9 preponderance. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorenson v.  
10 Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). “It means such relevant evidence as a  
11 reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402  
12 U.S. 389, 402, 91 S. Ct. 1420 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S.  
13 197, 229, 59 S. Ct. 206 (1938)). The record as a whole must be considered, Howard v. Heckler,  
14 782 F.2d 1484, 1487 (9th Cir. 1986), and both the evidence that supports and the evidence that  
15 detracts from the ALJ’s conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir.  
16 1985). The court may not affirm the ALJ’s decision simply by isolating a specific quantum of  
17 supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If  
18 substantial evidence supports the administrative findings, or if there is conflicting evidence  
19 supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive, see  
20 Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an  
21 improper legal standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d  
22 1335, 1338 (9th Cir. 1988).

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1 III. Analysis

2 Plaintiff asserts the ALJ ignored plaintiff's complaints of fatigue in determining  
3 plaintiff could perform a full range of light exertional work. Specifically, plaintiff contends the  
4 ALJ disregarded the report of a consultative examiner.<sup>2</sup> Residual functional capacity is what a  
5 person "can still do despite [the individual's] limitations." 20 C.F.R. §§ 404.1545(a), 416.945(a)  
6 (2003); see also Valencia v. Heckler, 751 F.2d 1082, 1085 (9th Cir. 1985) (residual functional  
7 capacity reflects current "physical and mental capabilities").

8 Contrary to plaintiff's contention, the ALJ expressly acknowledged the findings of  
9 consultative examiner, Dr. Sharma, who opined in a report dated May 30, 2001 that due to  
10 plaintiff's complaints of increased fatigue, plaintiff "may have problems with sustaining activity  
11 beyond two hours at a time without a break." AT 16-17, 139. The vocational expert testified  
12 that the jobs cited as available to plaintiff based on plaintiff's vocational factors and a residual  
13 functional capacity for light work would still be available to plaintiff if breaks were needed every  
14 two hours. AT 59-60. The ALJ did not totally discount plaintiff's complaints of fatigue. The  
15 ALJ properly noted that plaintiff's self-reported activities of daily living and the objective  
16 evidence in the medical record were consistent with the ability to work in a job which allowed  
17 for regular breaks. AT 16, 17-18, 106, 107, 115, 116. There was no error in the ALJ's  
18 assessment of plaintiff's fatigue.

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24 <sup>2</sup> Plaintiff cites Social Security Ruling 99-2p in support of the contention plaintiff's  
25 fatigue was improperly evaluated. Plaintiff does not explain how SSR 99-2p, which pertains to  
26 evaluation of chronic fatigue syndrome, should be used in evaluating this case, except to say that  
it "provides a basis for assessing plaintiff's limitations." Pl.'s Mem. P. & A. at 7. The court has  
reviewed the cited ruling and finds no error in the ALJ's analysis predicated on SSR 99-2p.

1 The ALJ's decision is fully supported by substantial evidence in the record and  
2 based on the proper legal standards. Accordingly, IT IS HEREBY ORDERED that:

3 1. Plaintiff's motion for summary judgment or remand is denied, and

4 2. The Commissioner's cross-motion for summary judgment is granted.

5 DATED: September 29, 2005.

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8 UNITED STATES MAGISTRATE JUDGE  
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